ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of	)	
	)	
GTE CORPORATION,	)	
Transferor,	)	CC Docket No. 98-184
	)	
and	)	
	)	
BELL ATLANTIC CORPORATION,	)	
Transferee.	)	
	)	
For Consent to Transfer of Control	)	

COMMENTS OF RCN TELECOM SERVICES, INC.

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Dated: November 23, 1998

SUMMARY

RCN Telecom Services, Inc. ("RCN") opposes the proposed transfer of control of GTE Corporation to Bell Atlantic Corporation for three reasons. First, the applicants have not carried out their obligations under Sections 251 and 252 of the Communications Act of 1934 ("Act").[1/] As detailed herein, both of them discriminate in myriad ways against local competitors, such as RCN. Indeed, GTE has proven itself to be the most anti-competitive incumbent local exchange carrier in the country. If the Commission consents to the proposed merger, the resulting entity no doubt will reflect GTE's proclivity for discrimination, thereby setting back the cause of competition in the Northeast by years.

Second, in the absence of the proposed merger, GTE would a natural local competitor for Bell Atlantic in Pennsylvania and Virginia, since GTE possesses significant network assets, expertise, and market presence in those states. Bell Atlantic seeks to diffuse such potential competition through the proposed transfer of control. The Commission should not permit the applicants to agree to dilute the competitive effects of the Act.

Third, if consummated, the proposed merger would violate Section 271 of the Act. Currently, GTE provides interLATA services in Bell Atlantic's region. Bell Atlantic does not have Section 271 authority for any of its states. If that situation does not change by the time the merger closes, an affiliate of Bell Atlantic will be providing interLATA services illegally in Bell Atlantic's region. The applicants state their intention to seek "transitional" relief to address such a situation. However, the Commission has no power to suspend, waive or modify Section 271 of

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1/ 47 U.S.C. § 151 *et seq.*

the Act. Therefore, in the event that Bell Atlantic does not receive the appropriate Section 271 authority by the time the merger closes, GTE must divest itself of all subscribers to interLATA services.

For these reasons, RCN urges the Commission to reject the proposed merger application. However, in the event that the Commission decides to approve the merger, it should adopt the conditions set forth below to minimize the anti-competitive impact upon competitive local exchange carriers.

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COMMENTS OF RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), through undersigned counsel and pursuant to the Commission's *Public Notice* (dated October 8, 1998), submits these comments on the above-captioned application for authority to merge GTE Corporation into Bell Atlantic Corporation ("Application"). Attached as Exhibit A is the signed Declaration of Joseph O. Kahl, supporting the factual assertions herein.

INTRODUCTION

RCN opposes the proposed merger because it would be anti-competitive and contrary to the public interest. Neither Bell Atlantic nor GTE has met its obligations under the Act. In fact, as shown below in Section I, both of these incumbent local exchange carriers ("ILECs") discriminate against competitive local exchange carriers ("CLECs") in an effort to discourage local competition. After the proposed merger, such anti-competitive behavior likely will intensify. Furthermore, allowing Bell Atlantic and GTE to merge would ensure that the latter never competes against the former, which it could do now. In addition, there would be

significant problems with the merger under Section 271 of the Act, because GTE currently provides interLATA services in Bell Atlantic's region. For all of these reasons, the Commission should reject the application. Even if (contrary to RCN's argument) the Commission did decide to approve the Application, it should condition its approval as set forth in Section IV below.

STANDARD OF REVIEW

In the *Bell Atlantic-NYNEX Merger Order*,[2/] the Commission examined the impact of the proposed merger upon local competition within the applicants' service territories. Specifically, the Commission inquired into the applicants' efforts to comply with Title II of the Act, including those provisions requiring ILECS to provide the following:

(1) interconnection;

(2) unbundled network elements at reasonable and nondiscriminatory prices;

(3) retail services at wholesale rates;

(4) reciprocal compensation;

(5) collocation;

(6) number portability; and

(7) dialing parity.

See generally id., 12 FCC Rcd 19985, ¶¶ 20009-10. The Commission stated that: "In addition, we also consider the effect of the merger on the Commission's ability to constrain market power as competition develops, but before competition is itself sufficient to constrain market power."

[2/] *Applications of NYNEX Corp. and Bell Atlantic Corp.*, 12 FCC Rcd 19985 (1997) ("*Bell Atlantic-NYNEX Merger Order*").

Id., 12 FCC Rcd 19985, ¶ 20009 (footnote omitted). As the Commission elaborated:

> It is, however, precisely because such competition is just beginning at this time and uncertainties exist that care in evaluating the potential impact of mergers in evolving markets is crucial to ensuring the development of pro-competitive, deregulatory national telecommunications industry structure.

Id., 12 FCC Rcd 19985, ¶ 200012.

RCN urges the Commission to apply the standards of the *Bell Atlantic-NYNEX Merger Order* in this case as it examines the proposed transfer of control of GTE to Bell Atlantic. Given that neither of the applicants have cooperated fully with local competitors, as detailed below, the impact of the proposed merger upon prospects for local competition in the service territories of Bell Atlantic and GTE is highly relevant to the instant inquiry.

ARGUMENT

I. THE MERGER WOULD UNITE AN ANTI-COMPETITIVE ILEC WITH THE MOST ANTI-COMPETITIVE ILEC IN THE COUNTRY

A. Bell Atlantic has Engaged in Significant Anti-Competitive Activities Directed Against CLECs

RCN currently operates in Bell Atlantic territory in Massachusetts, New Jersey, New York and Pennsylvania[3/] and, in seeking to implement interconnection with Bell Atlantic, has been the victim of numerous anti-competitive actions. In the recent past, Bell Atlantic:

- sought to charge RCN exorbitant special construction costs, ranging up to several hundred thousand dollars, to collocate in various of its central offices in New York and Pennsylvania;

3/ RCN's indirect subsidiary Starpower Communications, LLC ("Starpower") operates in the Washington, D.C. metropolitan area in a joint venture with Potomac Electric Power Company.

- delayed for months granting RCN route diversity for its SS7 network in New York;

- refused to provide RCN with STS-1 interconnection and B8ZS level connectivity in Pennsylvania, even though Bell Atlantic is obligated to do so under its interconnection agreements with RCN;

- refused to interconnect with RCN in Massachusetts via the electrical manholes serving its central offices;

- delayed granting RCN access to the customer name database in New York;

- refused to make digital subscriber line services (*i.e.*, xDSL) available for resale throughout its region, including in New York and the Washington, D.C.-metropolitan area;

- attempted to restrict RCN's use of network elements in New York so that RCN could only provide switched local exchange and switched exchange access services;

- delayed providing RCN access to poles and conduits in Massachusetts, New Jersey, New York, and Pennsylvania; and

- failed to honor its obligations under Section 252(i) of the Act.

Bell Atlantic and RCN have settled some of these items listed above, but only after RCN expended significant resources litigating the matters before state regulators. However, the last four items currently are a source of dispute, as the following subsections explain.

1. Bell Atlantic Has Refused to make InfoSpeed DSL Available for Resale

Bell Atlantic has begun to market an asynchronous digital subscriber line service, called InfoSpeed DSL, in Maryland, New Jersey, Pennsylvania, Virginia, and Washington, D.C. and will do so in New York during the first quarter of 1999.[4/] RCN has sought to resell InfoSpeed

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[4/] GTE currently offers its own xDSL service in various jurisdictions. *See GTE Telephone Operating Companies GTOC Tariff No. 1*, CC Docket No. 98-79, FCC 98-292 (rel.

DSL, but has been rebuffed by Bell Atlantic. The Commission should not approve the proposed merger until Bell Atlantic agrees to make InfoSpeed DSL available for resale pursuant to Sections 251(c)(4) and 252(d)(3) of the Act (*i.e.*, with a wholesale discount) wherever it offers the service.

2. Bell Atlantic Has Sought to Restrict CLECs' Use of Network Elements to Switched Local Exchange Service and Switched Exchange Access

In New York, Bell Atlantic has tariffed a combination of the loop, transport and multiplexing (if necessary) known as the Expanded Extended Link ("EEL"), by which it seeks to comply with its obligations under Section 251(c)(3) of the Act. 47 U.S.C. § 251(c)(3) ("An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications services."). Bell Atlantic's proposed EEL tariff does not permit purchasers to provide any services over the EEL other than switched local exchange service and switched exchange access service.[5/] This restriction patently violates the Commission's rules:

> An incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.

47 C.F.R. § 51.309(a).

Oct. 30, 1998).

[5/] New York Telephone Company P.S.C. No. 916 — Telephone, § 5.14.2.8(b) (proposed tariff provisions restricting expanded extended links to "the provision of Switched Local Exchange service (dial tone) and associated Switched Access Service").

3. Bell Atlantic Has Delayed Granting RCN Access to Pole and Conduit Space

Bell Atlantic has delayed providing RCN access to pole and conduit space in Massachusetts, New Jersey, New York, and Pennsylvania. Carriers like RCN that are building their own network require access to Bell Atlantic's pole and conduit space to install interoffice transport and loop plant. In the case of transport, RCN cannot turn up entire legs of its network if Bell Atlantic has delayed the provision of pole or conduit space at any point. In regard to loop plant, such delays force RCN's customers to wait unduly long to receive facilities-based service from RCN.

RCN has suffered from extremely lengthy delays in placing new conduit in Manhattan. The process of obtaining such conduit has taken up to 189 days per excavation request. The process should take no longer than three months for any particular excavation project. Furthermore, Bell Atlantic owns existing conduit in Manhattan, which travels from manholes to customer locations, but typically has rejected RCN's requests for access on the ground that available conduit space is being reserved for future use.

RCN has experienced significant delays in accessing Bell Atlantic's poles in Massachusetts, New Jersey and Pennsylvania. The delays often exceed eight months per application (for 200 poles) as RCN waits for Bell Atlantic to complete "make ready" work.[6/] It should take Bell Atlantic no longer than three months to make pole space available.

[6/] The term "make ready" work refers to Bell Atlantic's practice of preparing poles so that RCN can place its attachments.

In Section IV.K below, RCN urges the Commission to adopt performance standards and remedies regarding access to pole and conduit space in the Bell Atlantic/GTE territories, if the Commission determines to approve the proposed merger.

4. Bell Atlantic Has Abused the Adoption Process under Section 252(i) of the Act

Bell Atlantic has used the opt in process under Section 252(i) of the Act to attempt to exact concessions from CLECs regarding reciprocal compensation. For example, in September 1998, Choice One Communications Inc., a New York CLEC, asked to adopt one of Bell Atlantic's New York interconnection agreements. Bell Atlantic returned an adoption agreement that would have denied Choice One reciprocal compensation for terminating traffic to internet service providers, contrary both to the language of the primary interconnection agreement and to a controlling Commission decision on the subject. Bell Atlantic later relented, but only after Choice One had to incur the expense of bringing the matter to the Commission's attention. CLECs should not have to litigate to obtain an interconnection agreement under Section 252(i) of the Act.[7/] *See* Section I.B.3, *infra* (arguing that GTE similarly has abused the process under 47 U.S.C. § 252(i)).

B. GTE Takes Anti-Competitive Practices to a New Level

The proposed merger is anticompetitive and contrary to the public interest because it will vastly increase the size and economic power of a company (GTE) with a long history of resisting competition and violating federal and state law. Unlike the Bell Operating Companies ("BOCs")

[7/] Similarly, GTE has announced a policy of refusing to pay CLECs, such as Starpower, reciprocal compensation for traffic to internet service providers in Virginia and California, despite orders of the relevant state regulators to the contrary.

companies — which are at least subject to the restraint that they cannot enter the long-distance market until they have complied with the Competitive Checklist of Section 271 of the Act, 47 U.S.C. § 271(c)(2)(B) — GTE can offer interLATA services wherever it wishes and, as a consequence, has found little reason not to obstruct the development of competition. GTE's tactics have served to close GTE's markets in many states to any substantial local competition. Data on the number of resold lines and unbundled network elements that GTE has provided to CLECs reflects GTE's success in closing its markets to competition.[8/]

If GTE is permitted to merge with Bell Atlantic, thereby more than doubling in size and extending its influence to new markets, its ability and incentive to thwart competitive entry will be heightened, solely to the detriment of competition and the public interest. As shown below, GTE has employed a two-part strategy to frustrate competitive entry: (1) GTE makes it as costly and burdensome as possible for CLECs to enter its territory, and (2) it attempts to ensure that the

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[8/] The success of GTE's tactics is well documented. In its response to the Second CCB Survey on the State of Local Competition, GTE reported the total of local lines it has provided to other carriers and the total lines it has in service, as of June 30, 1998. The number of total local lines GTE provided other carriers (Total Service Resale and UNE), as a percentage of its total lines in service, is: California - 0.9%; Florida - 1.7%; Hawaii - .02%; Illinois - .005%; Indiana - .0007%; Kentucky - 0.2%; Michigan - 0%; North Carolina - .02%; Ohio - .004%; Oregon -.03%; Pennsylvania - .01%; Texas - 1.1%; Virginia - .02%; Washington - .02%; Wisconsin -.06%. http://www.fcc.gov/ccb/local-competition/survey/responses. Of the total lines GTE provided other carriers, slightly under 1% were UNEs. *Id.*

The comparable figures for Bell Atlantic, while also disturbingly low, are an order of magnitude higher than GTE's figures. The number of total local lines of Bell Atlantic provided other carriers (Total Service Resale and UNE), as a percentage of its total lines in service, is: Washington, D.C. - 0.75%; Delaware - 1.4%; Massachusetts - 2%; Maryland 0.4%; Maine - 0.3%; New Hampshire - 1.1%; New Jersey - 0.4%; New York - 2%; Pennsylvania - 1.4%; Rhode Island - 0.8%; Virginia - 0.3%; Vermont - 0.2%; West Virginia - 0%. *Id.* Of the total lines GTE provided other carriers, slightly under 12.3% were UNEs. *Id.*

terms and conditions under which CLECs can do business in its territory are as disadvantageous to them as possible. The data on market entry into GTE's territories set forth above attest eloquently to the success of this anti-competitive strategy.

1. GTE Draws Out the Negotiation Process in Bad Faith

All CLECs seeking to provide competitive local exchange services in GTE's service territory must begin by negotiating an interconnection agreement. While the Act sets out a swift negotiation schedule for reaching such agreements, GTE has perfected methods to make these negotiations difficult, protracted, and costly. GTE's negotiating position regularly ignores and conflicts with state arbitration rulings that have already been issued. As a result, each successive CLEC is forced to negotiate issues that have already been dispositively resolved at the state commission level, needlessly wasting the CLEC's resources and detracting from any legitimate issues the parties may need to resolve within the 160 day negotiating period provided by Section 252 of the Act.

Federal courts have uniformly rejected numerous premature GTE appeals of arbitration decisions.[9/] These GTE appeals serve only to delay the unencumbered availability of interconnection agreements to other CLECs that wish to exercise their 47 U.S.C. § 252(i) rights, preventing competitors from entering the local exchange market.

GTE has also employed obfuscation tactics in various negotiations by changing its positions once negotiations are substantially under way or even after an arbitration proceeding

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[9/] Published decisions in eight such premature GTE appeals are cited in *Michigan Bell Tel. Co. v. MFS Intelenet of Michigan, Inc.*, 1998 WL 413749 at *4 (W.D. Mich. July 21, 1998).

has commenced. CLECs that have negotiated with GTE on a multi-state basis have discovered that after they have negotiated or arbitrated interconnection agreements with GTE for one state, when they move on to negotiate an agreement with GTE for another state, GTE has insisted upon starting negotiations from scratch, rather than carrying forward terms and conditions already agreed to by the parties in other states. In one instance, GTE went so far as to raise at arbitration new contract issues it had never articulated in 160 days of negotiations with a CLEC.[10/] GTE's backtracking in negotiations violates its duty under Section 251(c)(1) to negotiate in good faith. The effect of this conduct upon CLECs is to inject unnecessary costs and delays into the interconnection process, which in turn harms consumers by delaying the arrival of genuine local competition.

2. GTE Has Supported Anti-Competitive Positions during the Arbitration Process

Once an arbitration proceeds, GTE again places serious obstacles in the way of resolving differences with CLECs. Specifically, GTE insists upon numerous contract provisions that range from being anticompetitive to patently frivolous. During arbitration proceedings, GTE has asserted, over CLEC protest, that it needed contract provisions that would give it the ability to do the following:

- Review in advance CLEC publicity when the CLEC's service is provided under the agreement; [11/]

[10/] *KMC Telecom Inc. Petition for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms and Conditions with GTE North Incorporated,* Cause No. 40832-INT-01 (IN U.R.C. February 11, 1998).

[11/] Verified Petition of US Xchange of Indiana, LLC For Arbitration of Interconnection Rates, Terms, and Conditions, *US Xchange of Indiana, LLC Petition for*

- Shift the costs of environmental compliance and clean up to CLECs without any showing that they created the environmental hazard; [12/]

- Unilaterally terminate the interconnection agreement when GTE sells an exchange to another carrier, leaving the CLEC with no means of serving its customers;[13/]

- Place onerous restrictions on resale of retail services, substantially impairing a CLEC's ability to resell a complete range of retail GTE services;[14/] and

- Escape liability for the gross negligence of its employees.[15/]

Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with GTE North Incorporated and Contel of the South, Inc. d/b/a GTE Systems of the South, Cause No. 41034-INT-01, at 15-16 (Ind. Util. Reg. Comm'n October 24, 1997) ("*USX Indiana Petition*").

[12/] *US Xchange of Indiana, LLC Petition for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with GTE North Incorporated and Contel of the South, Inc. d/b/a GTE Systems of the South*, Cause No. 41034-INT-01, at 6-10 (Ind. Util. Reg. Comm'n February 11, 1998) ("*USX Indiana Order*"); *BRE Communications, LLC Petition for Arbitration of Interconnection Terms, Conditions and Prices from GTE North Incorporated and Contel of the South, Inc. d/b/a GTE Systems of Michigan*, Case No. U-11551, at 24-26 (Mich. P.S.C. December 14, 1997).

[13/] Petition of GST Lightwave (WA), Inc. for Arbitration of Interconnection Rates, Terms and Conditions, *Petition of GST Lightwave (WA), Inc. for Arbitration of an Interconnection Agreement Pursuant to 47 U.S.C. Section 252 with GTE Northwest, Inc.*, at 34-36 (Wash. Utils. & Trans. Comm'n April 15, 1997).

[14/] Arbitration Award, *Petition of Sprint Communications Company, L.P. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with GTE North Incorporated,* Case No. 96-1021-TP-ARB (OH P.U.C. January 30, 1997) at 13; *USX Indiana Order,* at 5-6; Order, *Petition of AT&T Communications of Indiana, Inc. Requesting Arbitration of Interconnection Terms, Conditions and Prices from GTE North Incorporated and Contel of the South, Inc. d/b/a GTE Systems of Indiana, Inc.,* Cause No. 40571-INT-02, at 11-15 (December 12, 1996).

[15/] *USX Indiana Petition*, at 13-14.

Time and again, GTE forces CLECs to litigate the same issues, sometimes more than once in a single state. In short, GTE seeks to erect barriers to competition by diverting CLEC resources from serving customers to waging regulatory battles with GTE.

3. GTE Has Distorted the Adoption Process

Section 252(i) of the Act provides that CLECs may adopt other approved interconnection agreements. Adopting another interconnection agreement should be a wholly administrative task in which requisite filings are made to state commissions; negotiations are by definition unnecessary. However, GTE (like Bell Atlantic, as described in Section I.A.4 above) has turned the exercise of Section 252(i) rights into a protracted process riddled with pointless negotiations and interminable administrative delays.

After receiving a formal request to opt into a specific agreement, GTE returns a draft opt-in document that requires the CLEC exercising its Section 252(i) rights to adopt prospectively any subsequent modifications to the agreement that the original parties subsequently negotiate. This position does not withstand scrutiny. As an example, the initial CLEC could determine that it will pursue only a resale strategy and modify its agreement by deleting provisions for purchase of unbundled network elements in exchange for gains in other areas of the agreement. While this might benefit the initial CLEC, the CLEC exercising its Section 252(i) would be locked into an agreement that was desirable when it opted in, but has been changed by other parties and has become unsatisfactory. Clearly, ILECs are not entitled to renegotiate other carriers' contracts without their participation. Yet, GTE insists upon negotiating this provision every time a CLEC opts into a GTE interconnection agreement.

4. GTE Seeks to Charge CLECs Anti-Competitive Rates for Network Elements and Services

For CLECs to be able to compete effectively in GTE markets, they must be able to obtain network elements and services at cost-based rates. GTE has resisted vigorously the efforts of CLECs and state regulators seeking to establish forward-looking cost-based rates for network elements and services under Section 252(d)(1) of the Act. A CLEC has a choice: it can pay the unreasonable rates advocated by GTE or it can engage in a costly and time-consuming struggle in a rate proceeding to establish the impropriety of GTE's proposals. Since Congress passed the Act, GTE has consistently taken the position that it should be entitled to recover all of its historical costs from competitors through rates for unbundled network elements. For example, the Ohio PUC rejected GTE's position that its interconnection agreement with AT&T could not go into effect "until such time as the Commission has put into place a mechanism to provide GTE with the opportunity to recover its historic costs and (2) established a universal service system which is competitively neutral."[16/] Similarly, GTE unsuccessfully argued before the Ohio Commission in its arbitration with Sprint that Sprint should be required to pay for GTE's "opportunity costs."[17/]

Likewise, from Missouri to Hawaii to Indiana to Minnesota to North Carolina to New

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16/ Opinion and Order, *Petition of AT&T Communications of Ohio for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with GTE North Incorporated*, Case No. 96-832-TP-ARB (OH P.U.C. May 1, 1997) at Attachment, p.6.

17/ *Sprint Ohio Arbitration Award*, at 13.

Mexico,[18] GTE has repeatedly argued that the Act has caused it harm, so that it is forced to sell access to its network elements at rates that somehow are not compensatory. Of course, such claims are flatly inconsistent with the optimistic tone taken by GTE in its 1996 Annual Report, when its Chairman trumpeted passage of the Act as "a triple-win situation. It's good for the country. It's good for consumers. And it's *great* for GTE."[19]

The Act expressly prohibits the kind of stranded cost recovery that GTE has proposed in state after state. Section 252(d)(1)(A)(ii) of the Act specifically limits the costs that ILECs will be allowed to recover to those costs "determined without reference to a rate-of-return or other rate-based proceeding."[20] While the statute plainly disallows the stranded cost recovery that GTE repeatedly proposes, and no state commission to date has approved such a recovery mechanism in the telecommunications context, GTE continues to offer up this proposal in state after state in an effort to inflate its prices and foist historical costs onto competitors. Indeed, in addition to the Ohio Commission's above cited ruling in the AT&T and Sprint arbitrations, commissions in Missouri, Indiana, Minnesota, and New Mexico have already issued rulings stating that GTE's efforts to raise the costs that new entrants will pay to access its network and compete for customers are inconsistent with the Act.[21]

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[18] Case No. TO-97-124 (Mo. P.S.C.); Docket 7702 (HI P.U.C.); Cause No. 40618 (IN U.R.C.); Docket No. P-442, 407/M-96-939 (Minn. P.U.C.); Docket No. P-100, Sub133d (NC U.C.); Docket No. 96-310-TC (NM S.C.C.).

[19] 1996 GTE Annual Report, Chairman's Message (emphasis in original).

[20] 47 U.S.C. § 252(d)(1)(A)(i) (1996).

[21] *Re Sprint Communications Company, L.P.,* Case No. TO-97-124, 176 P.U.R. 4th 285, 289 (Mo. P.S.C. January 20, 1997); *Commission Investigation and Generic Proceeding on GTE's Rates for Interconnection Services, Unbundled Elements, Transport and Termination*

To place further burdens upon CLECs seeking to enter GTE territory, in addition to its "stranded cost" recovery theory, GTE has also proposed in several states that competitors pay a so-called "interim universal service" surcharge directly to GTE.[22/] Again, this surcharge has no relationship whatsoever to the pricing standards in the Act: GTE would have its competitors pay this extra amount to ensure that it does not lose any "support" when those competitors take certain customers away from GTE's network. This proposed surcharge also does not have any relation to universal service principles under the Act, as a mechanism that pays directly to the ILEC for alleged losses of implicit subsidies can hardly be considered equitable and nondiscriminatory.[23/] In fact, even though the fundamental principle of universal service is to make telecommunications affordable for consumers,[24/] GTE's proposed surcharges have been aimed solely at bolstering its competitive position through the imposition of unwarranted financial burdens on CLECs.

Under the Telecommunications Act of 1996, Cause No. 40618 (IN U.R.C. May 7, 1998); *AT&T Communications of the Midwest, Inc.*, Docket No. P-442, 407/M-96-939, 1997 WL 178602, at *12 (Minn. P.U.C. March 14, 1997); *Consideration of a Rule Concerning Costing Methodologies*, Docket No. 96-310-TC (N.M. S.C.C. July 15, 1998), at 50-52. Decisions in Hawaii and North Carolina are pending.

22/ Docket 7702 (Hawaii P.U.C.); Cause No. 40618 (Indiana U.R.C.); Docket No. P-100, Sub133d (North Carolina U.C.). Decisions on the proposed interim surcharge are pending in the Hawaii and North Carolina proceedings, while consideration of this issue has been transferred to a general universal service docket by the Indiana Commission. The New Mexico State Corporation Commission has rejected GTE's proposed interim universal service surcharge, noting that "double recovery of costs may result." *Consideration of a Rule Concerning Costing Methodologies*, Docket No. 96-310-TC, at 52 (N.M. S.C.C. July 15, 1998).

23/ *See* 47 U.S.C. § 254(b)(4) (1996).

24/ *Id.* at § 245(b)(1).

There can be little doubt, based upon its conduct in state permanent rate proceedings, that GTE will do everything in its power to impede CLECs' entry and add to their costs of doing business. Although Bell Atlantic's behavior (as noted herein) has been anti-competitive, GTE's track record is significantly worse. The Commission should not approve any arrangements through GTE's corporate philosophy toward competition would become characteristic of the merged entity.

II. THE MERGER WOULD ELIMINATE A SIGNIFICANT COMPETITOR IN THE BELL ATLANTIC REGION WITHOUT ADEQUATE JUSTIFICATION

The proposed merger would eliminate the possibility that GTE would ever compete with Bell Atlantic. The latter claims that GTE took few steps toward initiating such competition:

> Prior to GTE's withdrawal of its application for certification, GTE and Bell Atlantic signed an interconnection agreement in Virginia. It was one of 31 competitors to have done so. But unlike the 22 other companies that actually have entered the market, GTE never took any further steps to compete. To the contrary, all it did was sign an interconnection agreement virtually identical to an agreement negotiated between Bell Atlantic and another carrier.

Stallard Declaration, ¶ 19. Bell Atlantic's description of GTE's efforts to compete in Virginia omits crucial facts. While GTE indeed withdrew its application for certification as a CLEC in Bell Atlantic's Virginia service area, it did so only a few days before the instant Application was filed.[25/] In the weeks prior to the withdrawal, GTE vigorously litigated its right to be a CLEC, with such parties as MCI WorldCom intervening in the case. Had GTE prevailed in its bid to obtain certification, there is no telling what services it would have introduced in Bell Atlantic's

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25/ *Application of GTE Communications Corporation of Virginia For a certificate of public convenience and necessity to provide local exchange telecommunications service*, Case No. PUC980080 (Va. S.C.C.).

service area. It is disingenuous for Bell Atlantic to state that "all [GTE] did was sign an interconnection agreement virtually identical to an agreement negotiated between Bell Atlantic and another carrier."

Bell Atlantic and GTE argue that the merger will benefit competition, because: (1) the merged company will "attack" BOC "strongholds across the country"; and (2) the merged company will undertake the construction of a national fiber network that will enable GTE to provide "national data offerings like frame relay, ATM and VPN services." Public Interest Statement, at 1, 3. Neither of these contentions carries much weight.

In the absence of the proposed merger, both Bell Atlantic and GTE each already possess the resources and wherewithal to compete with BOCs around the country. In 1997, GTE had revenues of $23.2 billion and net income of $2.7 billion.[26/] Similarly, Bell Atlantic had 1997 revenues of $30.2 billion and net income of $2.4 billion.[27/] It is hard to believe that these companies are too "small" to launch competitive initiatives anywhere in the United States, especially considering that both of them have international operations in environments that are notoriously hostile to competition.[28/] Moreover, GTE and Bell Atlantic individually are

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[26/] GTE Corporation, 1997 Annual Report

[27/] Bell Atlantic, Investor Information, http://www.bell-atl.com/invest/financial/statements/income annual.htm (visited November 10, 1998)

[28/] GTE's international operations "stretch from British Columbia and Quebec in the north, to the Dominican Republic, Puerto Rico and Venezuela to the south." Public Interest Statement, at 14 n.10. Bell Atlantic has wireless investments in Mexico, Italy, Greece, Slovakia and the Czech Republic, and wireline investments in the UK, Thailand, Indonesia and the Philippines." Id. Bell Atlantic and GTE do not explained why, if they can enter new markets abroad without merging, they cannot also do so in this country.

comparable or larger than all but one of the carriers that they cite as principal competitors: Sprint (with $14 billion in 1997 revenue and $952 million in net income[29/]), MCI WorldCom (with $27 billion in 1997 revenue and $592 million in net income[30/]), and AT&T (with $51 billion in 1997 revenue and $4.3 billion in net income[31/]). There is also no question that GTE and Bell Atlantic individually dwarf even the largest companies in the next tier of CLEC competitors.[32/] Therefore, at most, there is only competitor (AT&T) larger than either Bell Atlantic or GTE, and that company has failed to make even a single in-road in local competition, such that it could threaten Bell Atlantic or GTE.

Additionally, the argument that GTE will be the "enabler" for competition with BOCs other than Bell Atlantic does not explain why GTE could not initiate such competition by itself. *See* Public Interest Statement, at 1. Bell Atlantic has nothing to offer GTE that would facilitate competing with other BOCs that GTE does not already possess. As noted above, GTE already enjoys the financial resources needed to support a competitive campaign. Bell Atlantic does not have any of the other assets necessary for such an initiative. For instance, Bell Atlantic lacks network facilities in or near the markets of other BOCs (which could complement the facilities that GTE currently has in such markets). The only facilities that Bell Atlantic controls are in its

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29/ Sprint 1997 Annual Report

30/ WorldCom, SEC Form 10-K (1997); MCI, SEC Form 10-K (1997).

31/ AT&T Earnings Commentary: October 26, 1998 3Q 1998 Appendices, http://www.att.com/ir/commentary/983q-cmnt-a.html#appendix-ii

32/ A recent Merrill Lynch report estimated that as of the end of the first quarter of 1998, the CLECs collectively had a 3.5% share of the $101 billion annual local market revenues – amounting to approximately $ 3.85 billion. Merrill Lynch, "Telecom Services – Local, CLECs: What's Really Going On" (June 19, 1998), at pp. 5, 9.

own territory, but GTE will not compete there after the proposed merger occurs. Likewise, the only customers that Bell Atlantic has are located in its own territory. It cannot offer GTE any kind of established customer base, beyond the customers that GTE already serves, in or near the service areas of the other BOCs. Other than half-hearted moral support, it is unclear what Bell Atlantic has to contribute to GTE's promised competitive campaigns against other BOCs.

Bell Atlantic and GTE also claim that they need to merge in order to construct a national fiber optic network. Public Interest Statement, at 3. They argue that GTE alone lacks the resources and customer base to complete such a project, but the merged entity will be able to do so. *Id.*, at 4. Their arguments lack force. The notion that GTE's ability to construct a national fiber optic network depends on having a customer base larger than its existing 22 million access lines does not withstand scrutiny. Qwest, IXC, Williams, and Level 3 are each constructing national fiber optic networks and do not have nearly as many customers as GTE does. By the same token, the resources of GTE and Bell Atlantic (set forth above) are such that either company alone could construct a national network (given, of course, appropriate regulatory approvals in the case of Bell Atlantic).

In sum, GTE and Bell Atlantic can hardly argue that, in the absence of the proposed merger, they lack sufficient resources to compete in the market. Rather than spurring competition, the merger will only remove GTE from the list of Bell Atlantic's potential competitors and vice versa.

III. IF IT APPROVES THE MERGER, THE COMMISSION MUST APPLY SECTION 271 OF THE ACT TO BOTH BELL ATLANTIC AND GTE

Under Section 271 of the Act, BOCs (such as Bell Atlantic) and their affiliates (which GTE would be under the proposed merger)[33/] may not provide interLATA services to subscribers located in any "in-region state" in the absence of Commission approval. The Act defines an "in-region state" to include all of the states within Bell Atlantic's region as of February 7, 1996. 47 U.S.C. § 271(i)(1). Currently, Bell Atlantic does not have — indeed, has not even requested — Section 271 authority for any of its states. By contrast, GTE presently provides interLATA services to subscribers in such Bell Atlantic states as New York, Pennsylvania, and Virginia. Accordingly, should Bell Atlantic consummate the transaction for which it seeks Commission approval, Bell Atlantic will be in direct violation of Section 271. Bell Atlantic will have circumvented the required Section 271 approval process and negated the key role of this Commission in deciding when and if Bell Atlantic will be allowed to provide interLATA services in its in-region states.

In the Application, Bell Atlantic and GTE gloss over this issue. Implicitly acknowledging that the post-merger provision of interLATA services will violate Section 271, they state that, if Bell Atlantic has not obtained Section 271 approval for its states in which GTE provides interLATA services by the time of closing, "the combined company will request any

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[33/] The Act defines an affiliate of a BOC as "a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent." 47 U.S.C. § 153(1). The term "person" includes corporations. 47 U.S.C. § 153(32). Unquestionably, under these definitions, GTE would be an "affiliate" of Bell Atlantic if the proposed merger occurs.

necessary transitional relief from the Commission." Public Interest Statement, at 19 n. 14. Bell Atlantic and GTE do not reveal how the Commission would grant "transitional relief," for they cannot do so. The Act expressly forbids the Commission from granting any waivers of, or otherwise modifying, the requirements of Section 271. *See* 47 U.S.C. § 160(d). Additionally, Bell Atlantic and GTE mention only that they intend to obtain transitional relief from the Commission, without regard to the statutorily-mandated involvement of state commissions in any decision to allow Bell Atlantic to provide interLATA services. *See* 47 U.S.C. § 271(d)(2)(B).

Notwithstanding the foregoing, if the Commission approves the proposed merger, GTE must shed *all* of its interLATA customers located in Bell Atlantic's region prior to closing. Moreover, the Commission should guard against the combined Bell Atlantic/GTE evading the restrictions of Section 271 through creative back-hauling of traffic and clever marketing.

IV. THE COMMISSION CANNOT PERMIT THE MERGER TO OCCUR WITHOUT SUBJECTING THE RESULTING ENTITY TO APPROPRIATE CONDITIONS

If the Commission chooses to approve the proposed merger, it nonetheless should require the merged entity to observe certain conditions, set forth below, to protect and enhance local competition in the combined Bell Atlantic/GTE service areas.

A. Stranded Cost Recovery

As noted in Section I.B.4, above, GTE intransigently has sought to recover its historical costs from competitors through rates for unbundled network elements, despite the forward-looking cost standard of Section 252(d)(1)(A)(ii) of the Act. GTE also has sought to recover anti-competitive universal service surcharges directly from its competitors. Only by making the

establishment of forward-looking rates for unbundled network elements a condition of merger approval can this Commission adequately ensure that make-whole schemes such as the so-called "universal service" surcharge that GTE has proposed routinely will not serve to deter competitive entry into in the country's local exchange markets.

B. Availability of Arbitrated Rates

In a number of states, GTE is declining to make available to other carriers those rates for unbundled network elements and resold discounts that are the product of its arbitrations with AT&T. Because AT&T and GTE have not executed final interconnection agreements in many states, GTE prevents other CLECs from purchasing unbundled network elements and resold services from GTE at the arbitrated rates. In essence, GTE would require each CLEC to relitigate the same cost studies to obtain these rates. Quite simply, GTE's position acts as a barrier to entry. Requiring GTE to make its arbitrated rates available to all competitors will dramatically reduce the legal costs associated with competitive entry and spare state commissions the administrative burden of repetitive arbitration proceedings.

C. Special Construction Charges

CLECs seeking to collocate in Bell Atlantic central offices that lack developed space have been confronted with massive special construction charges. The Commission should require that, as a condition of the merger, the new Bell Atlantic-GTE must refrain from assessing special construction charges against CLECs when it would not assess such charges to its own retail customers. The Commission's position in this regard is strengthened by the fact that special construction charges would not exist in a forward-looking network. Rather, the need for special construction is an attribute of the incumbent's embedded network design, which should

not be charged to CLECs.[34/]

D. Winback Programs

The Commission should issue a clear directive regarding the use of winback programs by Bell Atlantic-GTE and the sharing of information between its retail and wholesale operations. There is a great risk that, as CLECs win customers, Bell Atlantic-GTE will make special offers to win the customer back before its service with a CLEC even begins. To eliminate this potential, anticompetitive sharing of information, the Commission should rule that *prima facie* evidence of a violation of Section 251 of the Act exists when Bell Atlantic-GTE wins back a customer prior to switching over to the competitor's retail service. Moreover, to ensure that Bell Atlantic-GTE's incentives to engage in such conduct are minimized, the Commission should establish a window of time — perhaps 60 days — during which the merged entity would be prohibited from contacting any customer that has switched to a competitor's service.

E. Combinations of Unbundled Network Elements

As a precondition to the merger, the Commission should require the new Bell Atlantic-GTE to provide combinations of network elements, including the so-called "platform," without any restrictions whatsoever.[35/]

[34/] An administrative law judge in New York has recommended against allowing Bell Atlantic to recover special construction charges on the ground that they are incompatible with the construct of a forward-looking network. *Recommended Decision on Phase 3 Issues by Administrative Law Judge Joel A. Linsider*, Cases 95-C-0657, 94-C-0095, 91-C-1174, and 96-C-0036, at 115 (N.Y. P.S.C. October 2, 1998).

[35/] Since negotiating the Pre-filing Statement, Bell Atlantic has sought to restrict users of the Expanded Extended Link, which is a combination of network elements less than the total platform, to providing only switched local exchange service and switched exchange access.

F. Collocation Arrangements

The Commission should direct the new Bell Atlantic-GTE to allow CLECs:

(1) to collocate remote switching modules, which would increase the efficiency with which CLECs could provide local service;

(2) utilize collocation arrangements as small as 25 square feet; and

(3) obtain cageless collocation, in which the collocator may place its equipment alongside that of Bell Atlantic-GTE (rather than in separate, and therefore costly, locations).

G. Interim Number Portability

Despite the fact that this Commission has ruled that interim number portability ("INP") costs should be recovered from competitors in a competitively neutral manner,[36/] GTE has proposed in state after state that it should be permitted to recover the full incremental cost of providing INP from its competitors.[37/] The Commission specifically rejected such a proposal in its *Number Portability Order* and instead set forth a number of alternative mechanisms for states to consider in deciding how INP costs should be recovered. Rather than forcing competitors fight this issue time and again with GTE, the Commission should compel the new Bell Atlantic-GTE, as a condition of merger approval, to establish a competitively neutral INP cost recovery mechanism (consistent with those set forth in the *Number Portability Order*) for every jurisdiction in which it operates as an ILEC.

36/ *Telephone Number Portability*, CC Docket No. 95-116, First Report and Order (rel. July 2, 1996), at ¶ 138 ("*Number Portability Order*").

37/ Docket 7702 (Hawaii P.U.C.); Cause No. 40618 (Indiana U.R.C.); Docket No. P-100, Sub133d (North Carolina U.C.).

H. Performance Reports

The Commission should the performance reporting obligations of Bell Atlantic, under the Bell Atlantic-NYNEX merger commitments, to GTE and also increase the frequency of the reports from being quarterly to monthly.[38/] Given that Bell Atlantic currently *compiles* this data on a monthly basis, the additional burden of *publishing* the information on a monthly basis would be negligible. More frequent reports are necessary to identify rapidly instances of anti-competitive conduct on the part of Bell Atlantic-GTE, which as noted above are more likely to occur after the merger.

I. Performance Standards

The Commission should attach conditions to the merger compelling Bell Atlantic-GTE to satisfy certain levels of performance in providing interconnection services, unbundled network elements, and resold services to competitors. For each reporting category imposed pursuant to subsection J, above, the merged company should be required to meet a certain threshold of performance (whether it be a set interval or a specific success rate) so that carriers can identify occasions in which Bell Atlantic-GTE is discriminating CLECs. Although the Commission tentatively found in its OSS rulemaking that it would be "premature" to develop performance standards for ILECs in general,[39/] there is no other means in the context of the proposed merger to ensure that Bell Atlantic-GTE will provide service in a nondiscriminatory manner.

[38/] *Bell Atlantic-NYNEX Merger Order,* 12 FCC Rcd 19985, ¶¶ 13, 183, 193-94, Appendix C.1.d.

[39/] *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance,* CC Docket No. 98-56, RM-9101, Notice of Proposed Rulemaking, at ¶ 125 (rel. April 17, 1998).

J. Performance Standards for Pole and Conduct Access

As noted in Section I.A.3, above, RCN has experienced significant delays in attempting to access the pole and conduit space of Bell Atlantic. As a condition to the proposed merger, the Commission should require Bell Atlantic-GTE to observe specific performance guidelines for providing access to poles and conduit. First, Bell Atlantic-GTE should permit carriers like RCN to perform the excavation work for new conduit themselves (through approved contractors). This requirement would accelerate the time frame for deploying new conduit.

Second, the Commission should require Bell Atlantic-GTE to publish a report every six months on its use of existing, available conduit space, in order to discourage warehousing. If a CLEC makes a bona fide request for use of available conduit space which the merged company has reserved for its own use, the latter should make a showing in writing of exactly when and to what degree it will use the requested space.

Third, the Commission should require Bell Atlantic-GTE to use "stand-off brackets" and/or "guard arms" for mounting attachments on crowded poles. Carriers in the western United States currently use such brackets or arms to increase the capacity of poles and speed the process of making poles ready for additional attachments.

Fourth, the Commission should establish performance standards and remedies as set forth below:

Task	Performance Standard	Performance Remedy
Performing Conduit Excavations	Complete task within 100 days from date of request	Bell Atlantic-GTE pays the requesting CLEC $10,000 for each day exceeding 100 that an excavation that takes to complete
Performing "Make-Ready" Work on Poles (in Application Packages of 200)	Complete task within 100 days from date of request	Bell Atlantic-GTE pays the requesting CLEC $10,000 for each day exceeding 100 that an application package takes to complete

The foregoing performance standards and remedies are necessary to foster the develop of facilities-based CLECs that will be able to compete effectively with a combined Bell Atlantic-GTE.

K. Resale Restrictions

The Commission should require the new Bell Atlantic-GTE to commit to eliminate unreasonable restrictions on the resale of telecommunications services. For example, Bell Atlantic has repeatedly taken the position that whenever a customer under a contract service arrangement ("CSA") wants to switch the contracted service to a reseller, that switch of service is a termination of the CSA for which penalties will be assessed against the end user. This unreasonable restriction has no basis in law and serves only to deter end users from availing themselves of the competitive opportunities envisioned by the Act. Although the New York Public Service Commission has ruled against Bell Atlantic on this issue,[40/] it has simply refused to implement that Commission's order.

[40/] *See Complaint and Request of CTC Communications Corp.*, Case No. 98-0426, Order (N.Y. P.S.C. September 14, 1998).

L. DSL Services

As noted in Section I.A.1, above, Bell Atlantic has refused to make its DSL services available for resale at a wholesale discount. The Commission should require Bell Atlantic and GTE to do so as condition to merger approval.

M. Section 252(i) Compliance

Both Bell Atlantic and GTE should be required to cease their current practice of forcing CLECs that request to "opt into" existing interconnection agreements under Section 252(i) of the Act to accept various substantive changes or conditions. ILECs, such as Bell Atlantic and GTE, should be required unconditionally to accede to such requests, subject only to making such ministerial changes as inserting new names and addresses for the parties, identifying physical interconnection locations and so forth.

* * *

With respect to all these conditions, it is imperative that they be imposed as conditions precedent to the proposed merger, rather than as future commitments. Because undoing an effectuated merger is virtually impossible, the Commission's leverage will never be greater than prior to the grant of authority to merge. Moreover, the Commission must establish financial penalties in case Bell Atlantic-GTE fails to observe these conditions after the merger occurs, and, in the event of a dispute, the Commission should assign the burden of proof to the merged company. The Commission should adopt penalties sufficient to be taken seriously by the merged company.[41/]

[41/] The Commission should set the monetary penalty for performance remedies at a level to ensure compliance bearing in mind that Bell Atlantic-GTE would be a company with $53

CONCLUSION

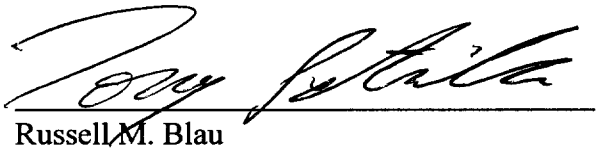
WHEREFORE, RCN respectfully requests the Commission to:

a) deny the application as contrary to the public interest; or

b) institute an investigation into the proposed merger; and

c) grant such further and other relief to RCN as may be appropriate upon consideration of the full evidentiary record developed at hearings.

Respectfully submitted,



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Dated: November 23, 1998

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billion in annual revenues. RCN urges the Commission to provide penalties of at least $10,000 per incident of non-compliance, with each additional day being considered a separate offense. *See* 47 U.S.C. § 503(b)(2)(B) (providing forfeiture not to exceed $100,000 for each instance in which a common carrier knowingly fails or neglects to obey or comply with the Act, condition of its authorization, or Commission order).

EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of	)	
	)	
GTE CORPORATION,	)	
Transferor,	)	CC Docket No. 98-184
	)	
and	)	
	)	
BELL ATLANTIC CORPORATION,	)	
Transferee.	)	
	)	
For Consent to Transfer of Control	)	

DECLARATION OF JOSEPH O. KAHL

Joseph O. Kahl declares that:

1. I am Director of Regulatory Affairs for RCN Telecom Services, Inc. I have reviewed the foregoing Comments of RCN Telecom Services, Inc. regarding the proposed transfer of control of GTE Corporation to Bell Atlantic Corporation.

2. To the best of my knowledge and belief, all of the factual assertions in the Comments are true and correct.

Pursuant to 47 C.F.R. § 1.16, I declare under penalty of perjury that the foregoing is true and correct. Executed on: November 23, 1998.

Joseph Kahl
Director of Regulatory Affairs
RCN Telecom Services, Inc.

CERTIFICATE OF SERVICE

I, T. Paul Taylor, hereby certify that on this 23th day of November 1998, I served a copy of the *Comments of RCN Telecom Services, Inc., CC Docket No. 98-184*; to the following parties listed below via hand delivery by messenger courier:

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